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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	
NO. 68717-s76D BY DOUGLAS F.	)	FINAL ORDER
TRUMAN, DONAVAN D. TRUMAN, AND	)	
KELLY O. TRUMAN	)	

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 24, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 68717-s76D is hereby granted to Douglas F. Truman, Donavan D. Truman, and Kelly O. Truman to appropriate 1000 gallons per minute up to 500.67 acre-feet of water per year for irrigation purposes. The water is to be diverted from Dodge Creek by means of a dry well and gravity flow pipeline at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 26, Township 37 North, Range 28 West,

**CASE # 68717**

in Lincoln County, Montana. The water is to be used for new sprinkler irrigation on a total of 154 acres; 40 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$  and 25 acres in the S $\frac{1}{2}$ S $\frac{1}{2}$  of Section 23, 40 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ , 25 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ , 17 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ , and 7 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 26. The water is to be used for supplemental sprinkler irrigation on a total of 135 acres; 120 acres in the S $\frac{1}{2}$ S $\frac{1}{2}$  of Section 23 and 15 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  Section 26, all in Township 37 North, Range 28 West.

The period of appropriation and period of use shall be from April 15 to October 31, inclusive of each year. The priority date is June 8, 1988 at 1:20 p.m.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is issued subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittees to the detriment of any senior appropriator.

B. Issuance of the Permit by the Department shall not reduce the Permittees' liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. This Permit is supplemental to Water Right Claims No. W34215-s76D, W34216-s76D, and W212578-s76D. These water rights may be combined to irrigate only overlapping parcels of

Permittees' original 45 acres. (See Finding of Fact 9.) The volume of water diverted from Dodge Creek for use on this acreage shall not exceed 22.95 acre-feet per year.

D. This Permit is also supplemental to Permit 12021-s76D. These Permits can be combined to irrigate only overlapping parcels of the 90 acres permitted as new irrigation by Permit No. 12021-s76D. (See Finding of Fact 9.) The volume of water diverted from Dodge Creek on 55 of the 90 acres permitted by Permit No. 12021-76D shall not exceed 28.05 acre-feet per year. The volume of water diverted from Dodge Creek for use on the remaining 35 acres of supplemental irrigation shall not exceed 85.05 acre-feet per year. Further, the combined volume of water diverted under these Permits for use on said 35 acres shall not exceed 85.05 acre-feet per year. The remaining 364.62 acre-feet per year shall be used for new irrigation on the acreage not noted in Conditions "C" and "D".

E. The Permittees shall keep a written record of the flow rate and volume of all water diverted, including the period of time, and shall submit said record by November 30 of each year to the Kalispell Water Rights Bureau Office at P.O. Box 860, Kalispell, MT 59903-860.

#### NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 24 day of November, 1989.



Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 21<sup>st</sup> day of November, 1989, as follows:

Douglas F. Truman  
Donavan D. Truman and  
Kelly O. Truman  
2655 West Kootenai Road  
Rexford, MT 59930

Dean B. Keim/Mike B. Krueger  
4155 West Kootenai Road  
Rexford, MT 59930

Royce E. and Helen H. Cantley  
500 Dodge Creek Road  
Rexford, MT 59930

Steven R. Johnson  
Kootenai National Forest  
506 U.S. Highway 2 West  
Libby, MT 59923

Chuck Brasen  
Field Manager  
P.O. Box 860  
Kalispell, MT 59903-0860



Irene V. LaBare  
Legal Secretary

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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	PROPOSAL FOR DECISION
NO. 68717-s76D BY DOUGLAS F.	)	
TRUMAN, DONAVAN D. TRUMAN, AND	)	
KELLY O. TRUMAN	)	

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a contested case hearing in the above-entitled matter was held on July 26, 1989 in Eureka, Montana.

Applicants Kelly O. Truman and Donavan D. Truman appeared at the hearing by and through Donavan D. Truman.

Applicant Douglas F. Truman appeared at the hearing in person and by and through Donavan D. Truman.

Michael W. McCurry appeared as a witness for the Applicants. Mr. McCurry is a consultant who had worked for the Soil Conservation Service (hereafter SCS) for eight years and then taught hydrology, hydraulics, and other conservation related subjects at the University of Colorado.

Objectors Royce E. Cantley and Helen H. Cantley appeared at the hearing by and through Royce E. Cantley.

Objectors Dean B. Keim and Mike B. Krueger did not appear at the hearing.

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Objector U. S. Department of Agriculture, Forest Service, Kootenai National Forest (hereafter Kootenai Forest) did not appear at the hearing.

Charles F. Brasen, Field Manager of the Kalispell Water Rights Bureau Field Office, appeared as staff witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

#### PRELIMINARY MATTERS

Objector, Kootenai National Forest, holds an unquantified water right listed in the Temporary Preliminary Decree of the Kootenai River Basin as Water Right Claim No. W052104-s76D for fish and wildlife purposes. Kootenai National Forest withdrew its objection after receiving a letter dated February 16, 1989 from Charles F. Brasen suggesting the standard condition placed on every permit would protect Kootenai National Forest's prior right. (See Department file.)

#### EXHIBITS

Applicants' Exhibit 1 is a photocopy of a USGS map that has been enhanced to show the point of diversion, places of use, location of existing and proposed pipeline, the proposed booster pump station, and the site that Michael McCurry observed in July of 1988. The latter was added during the hearing.

Applicants' Exhibit 2 consists of two pages. One page is a worksheet completed by the SCS that is captioned "Sprinkler Irrigation - System Design for Hand or Wheel Lines". The other

page is a completed SCS "Sprinkler Irrigation Design Guide" worksheet.

Applicants' Exhibit 3 is a sheet of bond paper with two photographs mounted on it. One photograph is of Dodge Creek at Objectors Cantley's headgate and the other is Dodge Creek below the headgate. Both photographs were taken May 8, 1989.

Applicants' Exhibit 4 is a sheet of bond paper with two photographs mounted on it. The photographs are of the same locations as Applicants' Exhibit 3 and were taken June 19, 1989.

Applicants' Exhibit 5 is a sheet of bond paper with two photographs mounted on it. The photographs are of the same locations as Applicants' Exhibits 3 and 4 and were taken July 11, 1989.

Applicants' Exhibits were accepted for the record without objection.

Objector Cantley offered no exhibits for the record.

Department's Exhibit 1 consists of 31 pages. The first page of the exhibit is a memorandum from Charles F. Brasen explaining how he estimated the flow of Dodge Creek and shows the multiple water rights for the same place of use. There are copies of five different calculations performed by Mr. Brasen. These copies show the Orsborn method used to estimate the flow of Dodge Creek as supplemental documents to the Water Court. There is one page of hand written calculations using the Orsborn method to calculate the flow of Dodge Creek in two different areas with two different amounts of precipitation. There is one

page of calculations of flow rate for gravity flow systems using an eight-inch pipe and again using a ten-inch pipe. There is a copy of parts of two pages of the Department's "Water Right Listing by Source Name" identifying the users of the waters of Dodge Creek. Also contained in this exhibit are copies of Objectors Cantley's three Decree Abstracts of Water Rights, and a copy of a page from the Temporary Preliminary Decree on Kootenai River Basin for Water Right Number W052140-76D claimed by the Kootenai National Forest, as well as a two-page copy of the Abstract of Claim for Existing Water Rights for that Claim.

Department's Exhibit 1 was accepted for the record without objection.

The Department file was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works there-



for except by applying for and receiving a permit from the department". The exceptions to permit requirements listed in § 85-2-306 do not apply in the present matter.

2. Application for Beneficial Water Use Permit No. 68717-76D was duly filed with the Department of Natural Resources and Conservation on June 8, 1988 at 1:20 p.m.

3. The pertinent portions of the Application were published in the Tobacco Valley News, a newspaper of general circulation in the area of the source, on July 28, 1988.

4. The source for the Applicant's proposed appropriation is surface water from Dodge Creek, a tributary of the Kootenai River. Dodge Creek is a perennial stream.

5. The Applicants propose to divert 1000 gallons per minute (gpm) up to 500.67 acre-feet per year of the waters of Dodge Creek by means of a dry well and gravity flow system at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 26, Township 37 North, Range 28 West, in Lincoln County. The water will be delivered to the places of use in the N $\frac{1}{2}$  of said Section 26 and the S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 23, Township 37 North, Range 28 West, by means of a gravity flow ten-inch pipeline to a gravity flow sprinkler system. For use in the SW $\frac{1}{4}$  of said Section 23, the water will be picked up by a booster pump located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 23 to supply more pressure to the sprinkler system.

The proposed places of use for new sprinkler irrigation are 80 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$  and 15 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 23, 40 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ , 25 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ , 17 acres in

the NE $\frac{1}{4}$ NE $\frac{1}{4}$ , and seven acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 26, all in Township 37 North, Range 28 West, for a total of 184 acres. The proposed places of use for supplemental sprinkler irrigation are 15 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 26; 40 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ , and 50 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 23, both in Township 37 North, Range 28 West, for a total of 105 acres. The proposed period of diversion and period of use is from April 15 through October 31, inclusive of each year. (Applicant's Exhibit 1, testimony of Donavan Truman, and Department file.)

6. A "dry well" is an excavation in the creek bank that has been riprapped so that the water seeps through the rocks from the creek into the excavation. The water is then diverted from the excavation. This system has been approved by the SCS. (Testimony of Donavan Truman and Department file.)

7. There are no available flow records for Dodge Creek. Using the Orsborn method,<sup>1</sup> Charles Brasen estimated that the average annual flow of Dodge Creek with 20 inches of precipitation would be 6.3 to 9.8 cubic feet per second (cfs) or 2827.44 to 4398.24 gallons per minute (gpm) and with 25 inches of precipitation, it would be 7.9 to 12.3 cfs or 3545.52 to 5520.24 gpm.

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<sup>1</sup> The Orsborn method originated with the United States Geological Survey to estimate the average annual flow of a stream. There are five equations that vary slightly based on hydrologically homogenous regions in Montana. To apply the Orsborn method, one must determine the watershed drainage area in square miles and the mean basin precipitation in inches, then insert these factors in the correct equation to obtain the average annual flow rate of a stream.

Applicants' witness, Michael McCurry, testified that he estimated the flow rate of Dodge Creek would be adequate to supply the present water users and the Applicants' proposed project eight years out of ten. Mr. McCurry suggested that by reconstructing Objectors Cantley's means of diversion, there may be adequate water even during the dry years. He stated that he agreed with the calculations Charles Brasen had made using the Orsborn method to calculate the flow of Dodge Creek and that his estimate of an adequate water supply eight years out of ten was based on his experience and his conservative nature. Mr. McCurry testified that in his experience, he found the Orsborn method to be accurate within 20%. Mr. McCurry also stated that he had observed Dodge Creek in July of 1988, a drought year, at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 35, Township 37 North, Range 28 West, and at that time, he estimated the flow to be approximately four cfs. That location is approximately three-quarters of a mile downstream from the Applicants' proposed point of diversion. (Testimony of Michael McCurry and Applicants' Exhibit 1.)

Applicant Donovan Truman testified that as long as his family, three generations, has lived near Dodge Creek, the creek had never gone dry.

9. The Applicants have two water rights in the Temporary Preliminary Decree on the Kootenai River Basin. Water Right Claim No. W034215-s76D is to irrigate 45 acres with the waters of an unnamed tributary of Tooley Lake at a rate of 126 gpm up to 45 acre-feet per year. The places of use under said right

are seven acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  and four acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 26, 26 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$  and eight acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 23, all in Township 37 North, Range 28 West. Water Right Claim No. W034216-76D is to irrigate 41 acres with the waters of Tooley Lake at a rate of 90 gpm up to 30 acre-feet per year. The places of use under this right are seven acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 26, 26 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ , two acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  and six acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Said Section 23. The Temporary Preliminary Decree limits these water rights as follows:

The water rights following this statement are supplemental, which means the rights have overlapping places of use. The rights can be combined to irrigate only overlapping parcels of the claimant's total 45 acres. The combined volume of these rights shall not exceed 92.00 acre-feet per year. Each right is limited to the flow rate, volume, place of use, and beneficial use of that individual right. W034215, W034216.

Applicants also have a late Statement of Claim before the Water Court, filed July 7, 1988, claiming to irrigate 46 acres with the waters of Young Creek. The place of use is the same as the aforementioned water rights. (Department records and Department Exhibit 1.)

On January 11, 1978, the Department issued Beneficial Water Use Permit No. 12021-s76D to Douglas and Stella Truman to appropriate water from Young Creek for irrigation purposes at a rate of .93 cfs or 420 gpm up to 231 acre-feet per year. The place of use is 90 acres for new irrigation in the S $\frac{1}{2}$  of Section 23, Township 37 North, Range 28 West. The places of

use for the supplemental irrigation are 15 acres in the S½ of said Section 23 and 15 acres in the NE½ of Section 26, Township 37 North, Range 28 West. The map submitted in the application shows the 30 acres of supplemental irrigation to be within the 45 acres and 41 acres irrigated by Water Rights Claims No. 34215-s76D and W034216.

In the instant case, Applicants indicated 105 acres of supplemental irrigation on the Application. There are, however, 135 acres of supplemental irrigation. Of those, 45 acres overlap Water Rights Claims Nos. W034215-s76D, W034216-76D, W212578-76D and 30 supplemental irrigation for Permit No. 12021-s76D. The remaining 55 acres of supplemental irrigation overlap 55 acres of the new irrigation permitted by Permit No. 12021-s76D. Approximately 35 acres of the new irrigation on this Application overlap 35 acres of the new irrigation authorized by Permit No. 12021-s76D. The remaining 154 acres are new irrigation, not overlapping any other water right.

Mr. Brasen testified at the hearing that he assumed those acres designated as new in this Application that overlapped the same acreage as permitted by Permit No. 12021-s76D would not be irrigated at all by that Permit. (Department file, Department Exhibit 1, and testimony of Charles Brasen.)

10. When asked how the Applicants would determine which source to use, Douglas Truman stated that would be determined by which source held up the best at the time it was needed. He stated that Young Creek has a lot more permits and other water

rights on it and sometimes all of them use a lot of water from Young Creek. When asked if there will be a primary source, Donavan Truman stated that there will be no primary source; that it will depend on which part of the system they are using and when they are using it.

11. There are presently nine other water rights on Dodge Creek downstream from the Applicants' proposed point of diversion. Seven of these water rights have been quantified in the Temporary Preliminary Decree on the Kootenai River Basin for a total flow rate of 1.28 cfs or 574.46 gpm up to 105.5 acre-feet per year. Of the remaining two water rights, one is for instream stock watering purposes with a decreed volume of 30 gallons per day per animal unit. The animal units are to be based on the reasonable carrying capacity and historic use of the area service by this water source. Department records reveal the original Statement of Claim for this water right indicated the carrying capacity for this property is 11.5 animal units. That being the case, the volume of water used for stock water would be .26 acre-feet per year. The total demand on that portion of Dodge Creek downstream from the Applicants' proposed point of diversion would then be 105.76 acre-feet per year. The other water right is an instream use for fish and wildlife purposes. This water right did not receive a quantified flow rate or volume; there is a remark on the abstract stating that this right is recognized as a beneficial use of water and that the flow rate and volume, though not

specifically decreed, are limited to the minimum amounts necessary to sustain this purpose. Since there are no flow records on Dodge Creek, it is difficult to determine the minimum amounts necessary for fish and wildlife purposes. However, during the drought year of 1988, Dodge Creek was flowing an estimated 4 cfs in July and none of the parties to the hearing said anything to indicate they had been contacted by Kootenai Forest to cease appropriating from Dodge Creek because the water was needed for fish and wildlife purposes. (Testimony of Mike McCurry, Department Exhibit 1, and Department records.)

12. Objectors, Royce E. and Helen H. Cantley, have three Water Right Claims which are listed in the Temporary Preliminary Decree of the Kootenai River Basin as Water Right Claims No. W141335-s76D for domestic use with a flow rate of 30 gpm up to 1.5 acre-feet per year, W141334-s76D for irrigation use on 25 acres with a flow rate of .95 cfs up to 82 acre-feet per year, and W141333-76D for the aforementioned stock watering purposes. The point of diversion for the domestic and stock watering use is the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 35, Township 37 North, Range 28 West, a little less than a mile downstream from the Applicants' proposed point of diversion. The point of diversion for the irrigation use is the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 35 which is approximately three-quarters of a mile downstream from the proposed point of diversion. (Department's Exhibit 1.)

Objectors Cantley alleged in their written objection that the flow of Dodge Creek is inadequate and issuance of a permit

for this Application would adversely affect the water rights in existence. In a subsequent letter to the Department, Royce Cantley stated his objection was made from his observations of Dodge Creek and information from the U. S. Forest Service. He also stated that he has owned his property for about a year and could not say what the creek has been like in the past. During the hearing, Mr. Cantley testified that his objection was based on the fact that there are no flow records of Dodge Creek and since he has been in the area only about a year and knew nothing of the historical flow of Dodge Creek, he felt he had to object to protect his water rights. (Department file and testimony of Royce Cantley.)

13. The Applicants recognize the prior rights of other users located downstream from their proposed point of diversion and that there may be periods when they will not be able to exercise all of a permit granted for this project. During the hearing, Applicant Donavan Truman indicated the Applicants would be willing to assist Objectors Cantley with reconstruction of their means of diversion so that both the Objectors Cantley and Applicants could utilize the water even during period of low flow. (Testimony of Donavan Truman.)

14. Department records indicate there are no other planned uses or developments on Dodge Creek for which a permit has been issued or for which water has been reserved.



Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties thereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth by § 85-2-311(1), MCA, are met:

(a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use; and

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 5 and 6.

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 14.

7. There are unappropriated waters in the source of supply at the proposed point of diversion in the amount the Applicants seek to appropriate at times when water can be put to the use proposed by the Applicants throughout the period from April 15 to October 31, inclusive of each year.

Although there are no recorded flow records available for Dodge Creek, the average annual flow rate has been estimated by the Orsborn method to be 6.3 to 9.8 cfs or 2827.44 to 4398.24 gpm in a year with 20 inches of precipitation and 7.9 to 12.3 cfs or 3545.52 to 5520.24 gpm in a year with 25 inches of precipitation. See Finding of Fact 7. The total demand of the quantified water rights on Dodge Creek currently is approximately 1.3 or 538.44 gpm up to 105.76 acre-feet per year, plus the water right for fish and wildlife that to date is unquantified. The Temporary Preliminary Decree on the Kootenai River Basin remarked that the right is limited to the minimum amounts necessary to sustain that purpose. That amount is probably less than 4 cfs because in July of the drought year 1988, Dodge Creek was observed flowing at an estimated rate of 4 cfs.

During the hearing no one mentioned that they had been contacted to cease appropriation of water from Dodge Creek because it was needed for fish and wildlife purposes. See Findings of Fact 7 and 11. Therefore, the total flow rate demand, if all water users exercised their right simultaneously, would be approximately 4.3 cfs or 1929.84 gpm leaving an estimated excess of 2 to 5.5 cfs or 897.6 to 2468.4 gpm in a year with 20 inches of precipitation and in years with 25 inches of precipitation, 3.6 to 8 cfs or 1615.68 to 3590.4 gpm. These calculations not only indicate there are waters available for appropriation; they also indicate there may be times, when all downstream water users exercise their rights simultaneously, that a permit with a flow rate of 1000 gpm could not be fully exercised.

There may be exceptionally dry years when a permit for 1000 gpm could not be exercised at all. However, an applicant cannot be required to absolutely guarantee there will never be a time when a prior appropriator will need to request that a junior appropriator cease appropriation of the source. If that were the case, there would be no need for the Doctrine of Prior Appropriation. It has been estimated that Dodge Creek would have enough water to supply all the prior rights and the Applicants' proposed appropriation eight years out of ten. See Finding of Fact 7. The Applicants were fully aware of this estimate and continued pursuing a permit. This would indicate

they thought the project was feasible even if they would only be able to use the water eight years out of ten.

8. The Applicants have provided substantial credible evidence there will be no adverse effect to prior water rights if a Beneficial Water Use Permit is issued for the proposed appropriation. During the hearing, the Applicants stated they recognized the prior water rights and that there may be times when they would not be able to exercise all of a Permit granted for this project. Applicants also stated they would assist Objector Cantley to reconstruct their diversion works so both the Applicants and Objector Cantley would be able to appropriate during periods of low flow.

9. The record indicates Applicants have four different water rights from three different sources for irrigation purposes. The places of use for each of them overlap the others to some extent. The places of use indicated in the instant Application also overlap all four of the others with a completely different source of supply. Approximately 35 acres designated as new irrigation in this Application overlap 35 acres in the S $\frac{1}{2}$ S $\frac{1}{2}$  of Section 23, Township 37 North, Range 28 West permitted by Permit No. 12021-s76D. This acreage must be considered supplemental until said Permit has been verified confirming the actual acres irrigated. The volume of water need not be reduced for that 35 acres; it appears the Applicants intend to irrigate this acreage entirely from Dodge Creek. Permit No. 12021-s76D has a flow rate and volume large

enough to irrigate 90 acres without supplemental water from any other water right. See Finding of Fact 9. When all the volumes are totaled, it may appear the amount of water is excessive for the amount of acreage to be irrigated. However, by limiting the total amount of water that can be appropriated for use on a particular piece of ground, the Department can ensure that no more water than can be beneficially used may be appropriated by combinations of Beneficial Water Use Permits. The Water Court also limits the amount of water to be used on overlapping parcels in the decrees issued for Claims of Existing Water Rights.

There are, in this Application, 154 acres that would be irrigated only with the waters of Dodge Creek. These particular acreages do not overlap any of the aforementioned water rights. See Finding of Fact 9.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 68717-s76D is hereby granted to Douglas F. Truman, Donavan D. Truman, and Kelly O. Truman to appropriate 1000 gallons per minute up to 500.67 acre-feet of water per year for irrigation purposes. The water is to be diverted from Dodge Creek by means of a dry well and gravity flow pipeline at a

point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 26, Township 37 North, Range 28 West, in Lincoln County, Montana. The water is to be used for new sprinkler irrigation on a total of 154 acres; 40 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$  and 25 acres in the S $\frac{1}{2}$ S $\frac{1}{2}$  of Section 23, 40 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ , 25 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ , 17 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ , and 7 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 26. The water is to be used for supplemental sprinkler irrigation on a total of 135 acres; 120 acres in the S $\frac{1}{2}$ S $\frac{1}{2}$  of Section 23 and 15 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  Section 26, all in Township 37 North, Range 28 West.

The period of appropriation and period of use shall be from April 15 to October 31, inclusive of each year. The priority date is June 8, 1988 at 1:20 p.m.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is issued subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittees to the detriment of any senior appropriator.

B. Issuance of the Permit by the Department shall not reduce the Permittees' liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. This Permit is supplemental to Water Right Claims No. W34215-s76D, W34216-s76D, and W212578-s76D. These water rights may be combined to irrigate only overlapping parcels of

Permittees' original 45 acres. (See Finding of Fact 9.) The volume of water diverted from Dodge Creek for use on this acreage shall not exceed 22.95 acre-feet per year.

D. This Permit is also supplemental to Permit 12021-s76D. These Permits can be combined to irrigate only overlapping parcels of the 90 acres permitted as new irrigation by Permit No. 12021-s76D. (See Finding of Fact 9.) The volume of water diverted from Dodge Creek on 55 of the 90 acres permitted by Permit No. 12021-76D shall not exceed 28.05 acre-feet per year. The volume of water diverted from Dodge Creek for use on the remaining 35 acres of supplemental irrigation shall not exceed 85.05 acre-feet per year. Further, the combined volume of water diverted under these Permits for use on said 35 acres shall not exceed 85.05 acre-feet per year. The remaining 364.62 acre-feet per year shall be used for new irrigation on the acreage not noted in Conditions "C" and "D".

E. The Permittees shall keep a written record of the flow rate and volume of all water diverted, including the period of time, and shall submit said record by November 30 of each year to the Kalispell Water Rights Bureau Office at P.O. Box 860, Kalispell, MT 59903-860.

#### NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must

be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 24<sup>th</sup> day of October, 1989.

*Vivian Lighthizer*  
Vivian Lighthizer, Hearing Examiner  
Department of Natural Resources  
and Conservation  
839 1st Avenue South  
P.O. Box 1269  
Glasgow, MT 59230  
(406) 228-2561

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 24<sup>th</sup> day of October, 1989, as follows:

Douglas F. Truman  
Donavan D. Truman and  
Kelly O. Truman  
2655 West Kootenai Road  
Rexford, MT 59930


Dean B. Keim/Mike B. Krueger  
4155 West Kootenai Road  
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Steven R. Johnson  
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506 U.S. Highway 2 West  
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Chuck Brasen  
Field Manager  
P.O. Box 860  
Kalispell, MT 59903-0860



Royce E. and Helen H. Cantley  
500 Dodge Creek Road  
Rexford, MT 59930

  
Irene V. LaBare  
Legal Secretary